COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
NO. 2015-SC-000159-D
(2013-CA-001246)

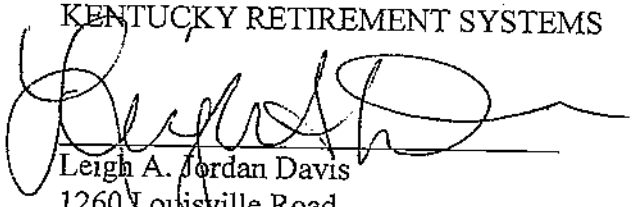
KENTUCKY RETIREMENT SYSTEMS, et al — APPELLANTS

v.

CHARLES WIMBERLY — APPELLEE

REPLY BRIEF FOR APPELLANTS

KENTUCKY RETIREMENT SYSTEMS



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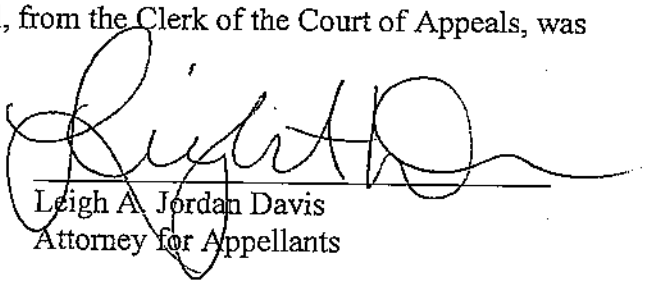
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Reply Brief for Appellants has been mailed, postage prepaid, on this the 18th day of March, 2016 to: Hon. John Gray and Hon. Roy Gray, 331 St. Clair Street, Frankfort, Kentucky 40601; Hon. Thomas D. Wingate, Franklin Circuit Court, 222 St. Clair Street, Frankfort, Kentucky 40601; and Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601.

I further certify that the Record on Appeal, from the Clerk of the Court of Appeals, was not withdrawn by counsel for Appellants.



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STATEMENT OF POINTS AND AUTHORITIES

Appellee argues that the Retirement Systems did not preserve the issue of administrative *res judicata* for review. He argues that the Systems did not raise this issue when the Appellee filed his second application, nor when the medical reviewers reviewed the second application. Appellee's argument is illogical. The doctrine of *res judicata* prevents relitigation of the same facts and issues. When Appellee filed his second application and the records were reviewed by the Medical Review Board, Appellee was not engaged in any litigation on that application. The administrative hearing process only began on the second application after Appellee appealed the denial of that application.

With regard to the Appellee's arguments that *res judicata* was not raised as an issue during the administrative hearing process, he is again incorrect. It is clear that *res judicata* was raised as an issue in the case as Appellee's previous counsel noted that it was discussed at the pre-hearing conference and set forth his opinion as to the applicability of this doctrine during the administrative hearing process.[1] As such, Appellee's arguments on this issue are without merit.

Appellee argues that the Systems did not object to or exclude evidence from his first application. However, this information should not be excluded altogether. These records are necessarily contained in the administrative record as they show the history of the Appellee's applications and what information was considered as part of the initial application. If this information were not included, then the second hearing officer would have no idea what was or was not considered as part of the initial application. Appellee's argument flies in the face of common sense. "When all else is said and done, common sense must not be a stranger in the house of the law." Cantrell v. Kentucky Unemployment Ins. Commission, 450 S.W.2d 235, 237 (Ky. 1970).

Similarly, Appellee's argument that his second application rendered the initial application moot also defies common sense. The fact that the Board of Trustees had not yet issued its Final Order when Appellee filed his second application is irrelevant. The filing of a second application has no effect on the validity of the first application under the statutes governing the disability application process[2].

Appellee also argues that the Hearing Officer commented on the evidence from the first administrative hearing and did not base his decision on *res judicata*. The Hearing Officer did utilize the doctrine of *res judicata*. While not specifically using that term, the Hearing Officer held that the records were largely duplicative of the first action, and that the Appellee "failed to provide any ***additional*** medical evidence to show that his conditions would prevent him from performing the duties of a Coach Driver for TARC as previously determined in the first decision."[3][4] Consequently, there was no reason for the Appellants to file Exceptions since the Hearing Officer utilized the doctrine. While the Appellee argues that the Board did not base its decision on *res judicata*, this Honorable Court should note that the Board adopted the Hearing Officer's Order on those findings.

Appellee also argues that Appellants did not raise *res judicata* as an affirmative defense pursuant to CR 8.03 and therefore, has waived it. However, the purpose of

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[1] A.R., pp. 907-909.

[2] Appellee questions whether a claimant is permitted to file a reapplication of benefits during the pendency of a previous appeal, and arguing that such an action would not be an economical use of resources. This is permissible under the statute, which allows reapplication within 24 months of the member's last day of paid employment. There is no limitation in the statute that would prevent a second application while an appeal is pending. As a practical matter, if the Board or a Court awards benefits while a second application is pending, the second application becomes moot and does not proceed any further as benefits have been awarded. Likewise, if the member is awarded benefits on the second application either by the medical reviewers or the Board, the initial application is dismissed by agreement of the parties as it would also become moot, since benefits would be awarded.

[3] A.R., p. 1002 (emphasis added).

[4] Appellee later argues that there was no error when the Hearing Officer also reviewed "old evidence" in addition to the new evidence from the second application. A careful review of the Recommended Order

requiring an affirmative defense is to give the Plaintiff notice of the Defendant's intent to introduce a new matter as a defense. Kentucky Practice Series, Civil Procedure Forms Chapter 33.1 (updated April 2012). Appellee was on notice that *res judicata* was an issue in the case as his previous counsel noted that it was discussed at the pre-hearing conference and set forth his opinion as to the applicability of this doctrine.[5]

Furthermore, CR15.02 provides in relevant part that:

> When issues not raised by the pleadings are tried by express or implicit consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleading as may be necessary to cause them to confirm to the evidence and to raise these issues may be made upon motion of any party at any time, event after judgment; but failure so to amend does not affect the result of the trial of these issues.

The case of Freeman-Jackson v. Board of Dentistry, 2006 WL1956801 (Ky. App.)[6] reflects that CR 15.02 also applies to whether *res judicata* was pled as an affirmative defense. In that case, the Court of Appeals noted that the Plaintiff in that action only brought up the failure to properly plead *res judicata* in her Motion to Vacate that court's judgment.[7] The Court of Appeals then permitted *res judicata* to be considered pursuant to CR 15.02.

The issue of administrative *res judicata* was tried by the parties in this matter as it was addressed in the parties' briefs at Franklin Circuit Court, the Court of Appeals, and in the parties' briefs before this Honorable Court, and has been ruled on by the court at each stage of the proceedings. The Retirement Systems requested permission of the

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demonstrates that while the Hearing Officer referenced the previous determination's records, his determination was based upon the new evidence submitted with the second application.

[5] A.R., pp. 907-909.

[6] Cited pursuant to CR 76.28(4) and attached hereto.

[7] This is analogous to the present matter as Appellee's Motion to Alter, Amend, or Vacate was the first time Appellee presented any objection to this issue.

Franklin Circuit Court to be able to amend its answer to conform to the evidence argued by the parties throughout the action; however, the lower court indicated its belief at the June 17, 2013 Oral Arguments that this was not necessary and proceeded to consider the issue of *res judicata* as it had been argued by the parties. Appellee presented this same objection before the Court of Appeals, which did not make any ruling that *res judicata* was not preserved, and instead chose to make a ruling upon that issue. Notably, Appellee did not file any cross-appeal of either the Franklin Circuit Court's decision or the Court of Appeals' decision which both addressed *res judicata* as the issue in the case.

Despite the fact that the Court of Appeals did not analyze or attempt to distinguish the cases of Hoskins, Holland, and Howard[8], Appellee attempts to fill those gaps by arguing that these cases are not applicable to the present matter.[9]

Appellee's argument related to Hoskins v. Kentucky Retirement Systems, et al., 2009-CA-000905-MR (Ky. App. 2011) only questions why the Court of Appeals in that case relied upon the case of E.F. Prichard Co. v. Heidelberg Brewing Co., 234 S.W.2d 487 (Ky. App. 1950). While the facts in Heidelburg are different from those considered in Hoskins, that does not affect the application of the doctrine: when there has been an adjudication, the same facts and issues cannot be relitigated. Appellee's focus on why Heidelburg was applied by the Court of Appeals is an unpersuasive attempt to draw attention away from the fact that the use of administrative *res judicata* has been

[8] Cited pursuant to CR 76.28(4) and attached to the Appellant's Brief as Appendices K, L, and M.
[9] Appellee also argues in a footnote that Appellants, in citing the case of Hollen v. Kentucky Retirement Systems, 2009 CA-000119-MR (Ky. App. 2010) in their argument regarding issue preservation, did not acknowledge that the Board did not apply *res judicata* to a second application filed by Ms. Hollen. Appellee misunderstands the procedural history of Hollen. The member there did not appeal the denial of her initial application, but instead merely filed a second application. Because there was no previous adjudication that included a hearing and full due process, administrative *res judicata* did not apply. Ky. Comm'n on Human Rights v. Lesco Mfg & Design Co., 736 S.W.2d 361 (Ky. App. 1987).

consistently applied to disability retirement actions for the last decade. This decade of established case law should be upheld.

Appellee also argues that the Heidelburg case is inapplicable as it was an appeal of a trial court decision, where this matter was an original action. Appellee fails to recognize that the present matter has risen in precisely the same manner as Hoskins, Holland, and Howard. Consequently, that argument should be given no credence.

The only argument that Appellee presents regarding the Hoskins case itself is that it is distinguishable because the Board in Hoskins concluded that Ms. Hoskins' reapplication was barred by *res judicata*, and that in the present matter, the Board did not so conclude and the agency did not raise the issue. Appellee is incorrect on multiple points. First, the Board in Hoskins did not find that the reapplication itself was barred, only that relitigation of the same facts and issues was not permitted under *res judicata*. Appellee's argument on this point mirrors a basic misunderstanding by the Court of Appeals in the present matter, where it held that Appellants argued that the Appellee was prevented from filing a second application.[10] Appellants have never asserted that the Appellee was prevented from filing an application, only that the facts and issues decided as a part of the initial administrative action are subject to administrative *res judicata*, and consequently, the Appellee did not prove he was disabled by new medical evidence not previously submitted.

Appellee's argument regarding Hoskins is also incorrect when he states that the Board in the present matter did not make any conclusion based upon *res judicata* and the agency did not raise the issue. As previously discussed, the Board of Trustees adopted the Hearing Officer's Recommended Order as permitted by KRS Chapter 13B. As the

Hearing Officer utilized the doctrine, albeit without using the term itself, the Board adopted that determination.

Appellee next argues that Holland v. Kentucky Retirement Systems, 2003 WL 1256710 (Ky. App.) was decided under an old version of KRS 61.600 and therefore is inapplicable to his case. However, the Court of Appeals' application of *res judicata* in Holland was not based upon the provision of KRS 61.600 that changed. Rather, this Honorable Court held that "[B]ecause Holland did not appeal from the Board's order adopting the hearing officer's conclusion, this finding is now *res judicata*." This Court did not base its determination that *res judicata* applied because of a lack of a change in condition; it applied the doctrine because the claimant there did not appeal the initial determination. As such, this case is still applicable.

Appellee then attempts to attack the recent decision in Howard v. Kentucky Retirement Systems, 2012-CA-001488-MR (Ky. App. 2013), stating that the holding in that case does not explain why it held that *res judicata* applies to disability retirement determinations. Howard clearly acknowledges the long established doctrine of *res judicata* and explained how it applies to a second application for disability retirement benefits: "[i]t must also be noted that because this is Howard's second application for benefits, *res judicata* applies; therefore, we only review denial of benefits as it relates to the new evidence submitted with the second application." (Emphasis added). The Howard Court's application of res judicata is consistent with the plain language of KRS 61.600(2).

Appellee argues that Howard and Hoskins overlooked the statutory requirement that the Board base its decision on the record as a whole. KRS 61.665(3)(d) provides

[10] Court of Appeals Opinion, p. 8.

"[A] final order of the board shall be based on substantial evidence appearing in the record as a whole and shall set forth the decision of the board and the facts and law upon which the decision is based." Just as in the above cases, the fact finder in the present matter reviewed the entire record as required, and correctly applied the law regarding *res judicata*. Specifically, the Hearing Officer in the present matter made note that the records that the Appellee submitted as a part of the current action were either duplicative of the records previously filed in his initial administrative action or long post-date his employment and do not reflect his condition since his last day of paid employment.

Under the theory set out in the Court of Appeals' Opinion and espoused by Appellee, the submission of <u>any</u> new objective medical evidence with a second disability application, regardless of relevance, forces the agency to reevaluate its prior findings and conclusions with a view towards reversing its decision and granting a lifetime of disability benefits, without regard to the comprehensiveness and accuracy of their prior final determination. Under this theory, the submission of even a single "new" doctor's visit note is sufficient to require the Board to completely reweigh all the evidence submitted as a part of the initial determination, and completely negate their prior analysis and conclusion upon review of hundreds, if not thousands, of pages of complex diagnostic and treatment records.

Appellants maintain that the plain language in KRS 61.600(2), permitting reapplication if accompanied by new objective medical evidence, does not bar, but rather embodies the tenets of *res judicata*. It precludes re-litigating the "same evidence" for a particular claim of permanent incapacity, and narrows the inquiry to whether the "new objective medical evidence" justifies a change from the previous disability determination.

That is exactly the process that occurred in the instant case. Between the two applications, all objective medical evidence tendered by Appellee was evaluated. The "reapplication based on the same claim of incapacity" was accepted and submitted for consideration because it was accompanied by new objective medical evidence. Appellee was provided an opportunity to be heard, present witness testimony and additional opportunity to present new objective medical evidence in support of his claim. The hearing officer acknowledged the old evidence from the first application and then assessed the newly submitted objective medical evidence accompanying the second application to determine whether a permanent incapacity existed.

As recognized by the Hearing Officer, the "new records" from his second application which Appellee asserts support a finding of disability were primarily duplicate copies of records from his first application. This Honorable Court is requested to take note that the only actual "new" evidence submitted as a part of that second administrative process long post-dated the Appellee's last day of paid employment and would not support a finding of incapacity since that date. Substantial evidence supports the agency's determination on this issue.

Appellee argues that the Court of Appeals was correct in finding that if new evidence is submitted, the Board should reconsider all of the evidence previously submitted. He argues that he submitted new objective evidence as a part of his second application that proved that he was disabled. However, this Honorable Court should be aware that all of the medical records cited by Appellee in his review of the evidence in this matter, which he argues demonstrates that he should be awarded benefits are all from his first application, that was not appealed. Most of the references he makes are to the

actual pages from the first administrative record.[11] Appellee also cites records submitted as a part of the second administrative appeal, but fails to note that these were duplicative of records from the first application. [12]

Appellee argues that the inclusion of the "old" records would present the Hearing Officer with the only full picture of the member's condition, because obviously the "new" records submitted would have been generated long after the one year anniversary of the member's last day of paid employment. Appellee's speculation is simply not correct. Often, members do not provide all of their relevant medical records as a part of their first application. Providers can be non-responsive to requests and relevant records can be forgotten by the member. Additionally, many members apply for benefits prior to their last day of paid employment, so records generated contemporaneously with the second application are still timely and relevant to the determination.

Appellee next argues that he clearly preserved the issue of alcoholism as behavior and not condition in his exceptions. Appellee and the Court of Appeals are incorrect on this point as the exception filed on this issue challenged the finding of the presence of alcoholism, but not its classification as a "behavior" rather than a "medical condition."

Appellee then asserts that the Systems' argument related to alcoholism was not raised before the Court of Appeals. Appellants have not presented arguments on this matter through this litigation based upon this Honorable Court's decision in Kentucky Retirement Systems v. Brown, 336 S.W.3d 8 (Ky. 2011). However, Appellants' argument in their Brief on this issue was presented specifically as it related to the dissenting opinion of the Court of Appeals. Appellants have merely urged this Honorable Court to

[11] A.R., pp. 13-15, 288-289, 290-293.

consider the well-reasoned opinion presented by Judge VanMeter in that dissent. Appellee argues that Judge VanMeter's reference to the DSM-5 was not part of the record; however, this Honorable Court can certainly take judicial notice of this manual if it finds Judge VanMeter's logic persuasive. The dissent raised a legitimate issue that Appellants believe this Honorable Court should consider as a clarification to Brown.

Lastly, Appellee argues that neither Judge VanMeter nor the hearing officers in this matter are licensed physicians. The Court of Appeals in the previously cited Hoskins case clearly held that "[M]edical records are often relied upon by hearing officers in administrative proceedings" and there is nothing to indicate that the hearing officer interpreted evidence that a reasonable person could not understand or rely upon. There is simply no requirement that Hearing Officers or judges be medical providers to review medical records in disability cases.

The Court of Appeals erred by rejecting the doctrine of administrative *res judicata* as it applies to disability determinations by Kentucky Retirement Systems, and the Retirement Systems respectfully requests that this Court **REVERSE** the decision of the Court of Appeals.

Respectfully submitted,

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[12] A.R., pp. 581-582 [previously found at pp. 166-167, 312-313], p. 656 [previously found at p. 306], p. 899 [previously found at p. 438].